Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DiGUGLIELMO; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CURTIS BRINSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. DOLGENOS
Chief, Federal Litigation
RONALD EISENBERG
(Counsel of Record)
Deputy District Attorney
ROBERT M. FALIN
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

QUESTIONS PRESENTED

1. Where a state prisoner files a late federal habeas petition, may the federal court equitably toll the statute of limitations without even considering that the prisoner has failed to demonstrate reasonable diligence?

2. Where a district court dismisses a habeas petition without prejudice, but the court changes its mind years later and decides the dismissal was incorrect, is the earlier dismissal an extraordinary impediment to further federal review if the petitioner did not even appeal it?

3. At the very least, should this matter be remanded for reconsideration in light of three recent decisions by this Court – Rhines v. Webber, 125 S.Ct. 1528 (2005); Pace v. Diguglielmo, 125 S.Ct. 1807 (2005); and Gonzalez v. Crosby, 2005 WL 1469516, 2005 U.S. LEXIS 5014 (Jun. 23, 2005) – which held that consideration of the petitioner's diligence in overcoming obstacles to timely filing is mandatory, that months of unexplained delays defeats a claim for equitable tolling, and that a district court's dismissal of a prior habeas petition is not an extraordinary impediment to timely filing if the petitioner did not even appeal it?

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I. This Court should grant *certiorari* to affirm that, as a prerequisite to equitable tolling, federal courts *must* require a federal habeas petitioner to demonstrate reasonable diligence in overcoming some extraordinary impediment; Brinson has failed to make this showing. 9

A. The Third Circuit wrongly refused to consider whether Brinson acted with reasonable diligence. 10

B. Brinson did not act with reasonable diligence prior to the filing of his late federal habeas petition. 14

II. The district court's dismissal of Brinson's first federal habeas petition was not an "extraordinary circumstance" justifying equitable tolling. 20

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ORDERS AND OPINIONS BELOW

The February 8, 2005, judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court, is reported at 398 F.3d 225 (3d Cir.), and is reprinted in the Appendix at App. 5-25. The March 31, 2005, order of the Third Circuit denying the state's Motion for Rehearing *En Banc* is reprinted in the Appendix at App. 1-2. The June 20, 2001, report and recommendation of the magistrate judge is reprinted in the Appendix at App. 63-72. The July 31, 2001, memorandum and order of the district court rejecting the report and recommendation and referring the case back to the magistrate judge for further proceedings is reprinted in the Appendix at App. 56-62. The October 30, 2002, report and recommendation of the magistrate judge is reprinted in the Appendix at App. 34-55. The November 15, 2002, order of the district court denying the petition for writ of habeas corpus, and approving the report and recommendation, is reprinted in the Appendix at App. 32-33.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state criminal defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated February 8, 2005, reversing the order of the district court and remanding to the district court for an evidentiary hearing. The court denied *en banc* rehearing on March 31, 2005. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1), which provides as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

Three eyewitnesses saw appellant Curtis Brinson shoot and kill Arthur Johnson in the bathroom of a nightclub.

During the evening of April 13, 1985, Mr. Johnson and two friends visited Ripley's Discotheque in Philadelphia. While at the club, the three friends visited an upstairs bathroom. As Mr. Johnson was exiting a bathroom stall, three men approached him. One of these men, Brinson, blocked the entrance to the room, as another of them, co-defendant Marvin McAllister, grabbed Mr. Johnson's gold neck chain. Johnson then pushed his way out of the stall and demanded the return of his gold chain. Instead, Brinson pulled out a gun and shot him in the chest. Arthur Johnson died from the gunshot wound shortly thereafter (N.T. 5/2/86, 81, 87, 89-90, 92). The prosecution presented overwhelming evidence of Brinson's guilt, including several eyewitness accounts of the shooting. As a result, Brinson's only option at trial was to argue self-defense.

On May 13, 1986, a jury rejected this defense and convicted Brinson of first degree murder and possession of an instrument of crime. The same jury acquitted McAllister, Brinson's co-defendant. After denying post-verdict motions, the trial court sentenced Brinson to life imprisonment for murder and to a consecutive term of five years probation for possession of an instrument of crime.

Meanwhile, after Brinson's jury had been selected but before the trial began, this Court decided Batson v. Kentucky, 476 U.S. 79 (1986), holding that the discriminatory use of peremptory challenges against African-Americans violates the Equal Protection Clause. Brinson's

attorney had not objected to the prosecution's peremptory challenges as they were made, but attempted to take advantage of the new rule by making a Batson objection after the jury was seated but just before the trial started. While there was some disagreement over how many blacks had been struck, the prosecutor asserted, and the trial court agreed, that three African-Americans had been seated on the jury, the prosecution had accepted one additional African-American venireperson (who had been challenged by the defense), and the prosecutor had six challenges remaining unused at the close of jury selection. Brinson v. Vaughn, 398 F.3d 225, 228 (3d Cir. 2005), App. 9-10. Furthermore, this was not a racially charged case: The defendant, the victim, and the eyewitnesses were all black. The trial judge deferred the Batson issue to post-trial motions, and then rejected it.

Brinson appealed his convictions to the Pennsylvania Superior Court, arguing, *inter alia*, that the prosecutor exercised his peremptory challenges in violation of Batson. The Superior Court affirmed the convictions, Commonwealth v. Brinson, 541 A.2d 1148 (Pa. Super. 1988) (table); and the Pennsylvania Supreme Court denied discretionary review, Commonwealth v. Brinson, 553 A.2d 964 (Pa. 1988) (table).

On September 27, 1993, Brinson filed a *pro se* petition for state collateral review under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, *et seq*. The Philadelphia Court of Common Pleas appointed counsel, who subsequently filed an amended petition. The PCRA court later dismissed this petition. The Superior Court affirmed the dismissal, Commonwealth v. Brinson, 673 A.2d 399 (Pa. Super. 1995) (table); and the Supreme Court denied Brinson's request for discretionary review, Commonwealth v. Brinson, 694 A.2d 619 (Pa. 1996) (table).

After the Pennsylvania Supreme Court denied discretionary review, Brinson filed a petition for writ of habeas corpus in federal court, alleging, *inter alia*, a Batson violation. Brinson claimed to have after-discovered evidence to support the claim, namely, a videotaped lecture from 1986, where the prosecutor in this case, Jack McMahon, expressed his personal views about jury selection. This tape had been created under a prior administration of the Philadelphia District Attorney's Office; it was subsequently rediscovered by the current administration, and it was promptly released to defense lawyers in March, 1997. Brinson argued that, in the tape, McMahon endorsed the racially discriminatory use of peremptory challenges, which, he argued, made it more likely that McMahon had discriminated in this case. Brinson had not, however, first sought state court review of the new evidence.

On September 22, 1997, the Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania dismissed the petition without prejudice for failure to exhaust state court remedies. Brinson v. Vaughn, No. 97-1978 (E.D.Pa. 1997). That is, Judge Fullam recognized that claims of new evidence must first be presented to the state courts, which Brinson had failed to do. Brinson did not appeal the district court's dismissal of his petition.

The PCRA contains a strict, jurisdictional time limit, barring all petitions filed more than one year after final judgment. There is an exception, however, for claims of newly discovered evidence; but even then, any petition must be filed within sixty days after the new evidence was discovered, or could have been discovered. 42 Pa.C.S.A. §§